

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**In re ISAIAH W., a Person Coming
Under the Juvenile Court Law.**

THE PEOPLE,

Plaintiff and Respondent,

v.

ISAIAH W.,

Defendant and Appellant.

A124615

**(Contra Costa County
Super. Ct. No. J08-01276)**

Defendant Isaiah W., born in February 1992, appeals an order committing him to the Department of Juvenile Facilities (DJF)¹ after he was found to have committed second degree robbery (Pen. Code, § 211), assault with a firearm (Pen. Code, § 245, subd. (a)(2)), and personal firearm use as to both counts (Pen. Code, §§ 12022.5, subd. (a), 12022.53, subd. (b)), and declared a ward of the juvenile court. He contends the juvenile court abused its discretion in committing him to DJF. We disagree and affirm.

BACKGROUND

At about 5:30 p.m. on October 7, 2008, 14-year-old I.S. (the victim) was walking home from track practice in Fairfield when defendant approached him from behind and

¹ The agency previously held the titles Division of Juvenile Justice and California Youth Authority. Herein we will refer to the agency as the DJF.

said, “Give me your stuff.” Defendant repeated the demand, pulled a gun from his waistband and pointed it at the victim’s legs. The victim then threw his duffle bag and backpack on the ground. Defendant picked up the items and fled. The victim had never seen defendant before this incident. The victim said the incident lasted about 30 seconds.

On October 9, 2008, a juvenile wardship petition (Welf. & Inst. Code, § 602, subd. (a))² was filed in Solano County Superior Court alleging defendant committed second degree robbery with personal use of a firearm, assault with a semiautomatic firearm (Pen. Code, § 245, subd. (b)) with personal use of a firearm, and resisting an officer (Pen. Code., § 69).

On October 10, 2008, the probation department filed a detention report noting that, in February, defendant was cited for giving false identification (Pen. Code, § 148.9) and the matter was later closed. In May, he was cited for fighting, causing loud noise, or using offensive words in public (Pen. Code, § 415); purchasing, receiving or possessing cigarettes, tobacco and/or smoking paraphernalia, and/or selling cigarettes or tobacco to a minor (Pen. Code, § 308); and vandalism (Pen. Code, § 594, subd. (b)). On September 30, he was arrested at Fairfield High School for resisting or deterring an executive officer (Pen. Code, § 69). His social worker expressed “grave concern” due to the serious nature of defendant’s behavior. Defendant had been residing in a foster home since August 14. The report stated the instant offense was “serious[,] presenting a grave risk to the community.” It noted defendant had just been released from “JDF the week before following an arrest for making threats against an officer.” It noted his history of verbally aggressive behavior which “has now escalated significantly.” It recommended defendant’s continued detention and transfer of the matter to Contra Costa County.³

On December 1, 2008, the court dismissed the resisting an officer count, sustained the robbery allegation, and found that defendant committed the lesser included offense of

² All further undesignated section references are to the Welfare and Institutions Code.

³ Defendant was at that time a section 300 dependent of the Contra Costa Juvenile Court.

assault with a firearm. Thereafter, the matter was transferred to the Contra Costa Superior Court for disposition.

Probation Department Report

Probation officer Momono's December 2008 report recommended that, pursuant to section 734, defendant be committed to DJF because "[defendant's] mental and physical condition and qualifications are such as to render it probable that [he] will be benefited by the reformatory, educational, discipline, or other treatment resources provided by the [DJF]." It noted that defendant became angry and upset when the DJF recommendation was discussed; he got up and walked away and refused further conversation. He attributed his involvement in the instant offense to "negative influences and poor judgment," acknowledged the seriousness of his misconduct, but did not verbalize any discernible remorse for his actions or concern for the victim. He denied any gang involvement or affiliation, but said he has anger management issues and would likely benefit from counseling.

Defendant was expelled from Antioch High School in October 2007 after making a threat against a school official. While there, his involvement in disruptive and/or defiant actions was frequent. He is not a special needs student. Thereafter, defendant attended a continuation high school for a short time until alleged physical abuse by his father resulted in his being placed in foster care in Fairfield. In August 2008, he was enrolled at Fairfield High School. On September 30, he was brought to the school's resource officer for being " 'defiant and incorrigible.' " Defendant threatened the officer and was arrested for violating section 69 of the Penal Code. It was the sixth time in just over a month he had been sent to the school's Student Management Officer for disruptive behavior and not following teachers' instructions.

Defendant reported first consuming alcohol at age 12 or 13, and presently uses alcohol on the weekends. An October 2008 Child and Family Services (CFS) report indicated defendant had stolen alcohol from his father. Defendant said he used marijuana about three times per week. He claimed he could stop, but when he did, he would

gradually return to marijuana use. He denied needing treatment or help regarding his marijuana use. His foster mother reported that he often smelled of marijuana. In September 2007, defendant was held at the California Family Crisis Center for 12 hours pursuant to section 5150. In 2007, he attended a few counseling sessions regarding his parents' separation and divorce; he discontinued counseling due to lack of interest.

As defendant approached early adolescence, his attitude and behavior became increasingly defiant, disruptive and destructive, and numerous runaways from home were reported. In September 2007, he destroyed his mother's mailbox and her vehicle's driver side view mirror, and threw potted plants against her house. Eventually she was unwilling to tolerate his continuous problematic behavior and he went to live with his father until he was removed due to his father's alleged abuse. Defendant's mother identified him as the " 'bad twin' and the family's problem child." Antioch police had 23 contacts with his family due to his mother refusing to allow him to return to her home. Defendant's older sister said their father was more at fault for defendant's behavior problems than defendant. However, she said defendant "has a problem with authority and does not listen to anyone."

Following a December 15, 2008 "section 242.1"⁴ conference, it was concluded that, based on the seriousness of the present offenses, defendant's section 300 dependency would be vacated, section 300 proceedings would be terminated, and defendant would be declared a ward of the court. Defendant was deemed unsuitable for the Orin Allen Youth Rehabilitation Facility (OAYRF) due to the seriousness of his offenses and defendant's use of a firearm in committing them. On December 10, defendant was screened by the probation department's placement screening committee, which deemed him unsuitable for placement in a community based facility due to the seriousness of his sustained offenses. The committee also determined the Youthful Offender Treatment Program (YOTP) was not appropriate for him because YOTP is an alternative placement for serious offenders with "non[-section] 707[, subdivision] (b)"

⁴ There is no section 242.1. This is an apparent reference to section 241.1.

offenses who are not eligible for DJF services and treatment. On December 19, defendant was screened by the DJF intake specialist, who opined that his offenses would make him a “Category 4 offender,” eligible for parole after two years. Defendant’s parole eligibility would be affected by his behavior and response to treatment while at DJF. While at DJF, he would receive services including assessment and evaluation of treatment needs, academics, risk and needs assessment, psychological testing, substance abuse counseling, anger management, victim awareness, and victim impact counseling.

The report stated that defendant “is a very angry and distressed young man.” Although polite, respectful and responsive, he can become “confrontational, threatening, and unpredictable” when he hears something he does not like, does not agree with, or takes offense at. His “dysfunctional pattern of behavior and acting out” has been ongoing for several years, and escalated to him being a “serious threat to the law-abiding community.” He has “allowed his feelings of abandonment, neglect, and anger to escalate to the point his delinquent activities are dangerous to anyone who gets in his way.” He expresses no genuine feeling of remorse or regret concerning the innocent victim he robbed while armed with a semi-automatic handgun. He has a “multitude of treatment needs including counseling to address issues of abandonment, victimization from physical abuse, substance abuse, anger management, improving his decision making skills, and impulse control. . . . [¶] The use of a firearm in the present matter cannot be minimized, condoned, or mitigated. Given the host of problems [defendant] presents, he is not considered appropriate for any non-secure community based program. The only alternative remaining which can address [defendant’s] needs while protecting the community is a commitment to the [DJF] and [it] is therefore recommended.”

Defendant’s Dispositional Evaluation

In response to a request by defendant’s counsel, correctional consultant Dayle Carlson interviewed defendant, defendant’s mother, and defendant’s former therapist, and reviewed police reports for the instant offenses, and the probation and CFS reports. Carlson’s dispositional evaluation report noted that defendant has four siblings, none of

whom have had trouble with the law, and all perform well academically. Dr. Evrad,⁵ a psychologist whom defendant and his twin brother saw for over a year, believed that defendant derived considerable benefit from therapy, and opined that defendant can respond to treatment. Defendant's sisters reported that their father often yelled at the children, but was physically aggressive only with defendant. CFS intervened after defendant's father punched him in the face because he thought defendant violated a curfew. Defendant told Carlson that the gun he used in the robbery was a "[nine-millimeter] replica 'Air Soft' pistol." When pressed, defendant said he feels remorse for his actions and wants to change his behavior.

Carlson stated defendant has no prior sustained juvenile petitions and no disciplinary problems while at juvenile hall and is a "level one" detainee. Carlson opined that risk to the community may increase if defendant is committed to DJF due to "the continued dismal rehabilitation offerings of [DJF]." Carlson opined that defendant is not likely to improve at DJF and the only benefit of a DJF commitment would be the short-term protection of the community. Carlson said that defendant is eligible for a "boot camp type" program such as Fouts Springs Youth Facility (Fouts), which has strict discipline, behavior modification, education, some counseling, and victim awareness programming. Carlson recommended that defendant be screened for acceptance at Fouts' long-term program.

March 2009 Dispositional Hearing

At the March 3, 2009 dispositional hearing, Carlson testified as an expert in juvenile sentencing; his testimony was consistent with his dispositional evaluation. He recommended that defendant be screened for placement at Fouts or Crystal Creek Boys Facility (Crystal Creek). He opposed committing defendant to DJF because of the deterioration of its rehabilitation offerings and the "*Farrell*" litigation filed in Alameda County, which concluded that although the planning process had improved at DJF, actual restructuring and improvement of services had not. Carlson noted that in the last quarter

⁵ Elsewhere in the record Dr. Evrad is referred to as Dr. Everett.

of 2008, 357 classes were cancelled at one DJF facility due to understaffing. He also noted a 70 percent recidivism rate for DJF parolees. He said the Fouts recidivism rate was between 28 and 32 percent, depending on the length of the commitment. He also opined that the education offerings at DJF would be “sporadic and spotty,” counseling services would not be consistently delivered, there would be an unacceptable rate of lockdown periods for safety reasons, and a DJF commitment would not be in defendant’s best interest. He said DJF did not meet the state mandate for the number of school days to be attended by a student. Carlson said that Crystal Creek had a more institutionalized counseling component and substance abuse treatment programs. He noted that the counseling at Fouts was “more ad hoc.” He said defendant needed counseling for substance abuse, victim awareness, and family trauma.

On cross-examination, Carlson conceded that defendant has a “very significant defiance problem.” He also conceded that after 47 family therapy sessions in the eighth grade, defendant had defiance problems. Carlson also conceded the seriousness of defendant’s offense behavior.

Momono testified that defendant admitted he needed anger management counseling and Momono agreed defendant needs counseling. The court interrupted Momono’s testimony and directed probation to screen defendant for YOTP and out-of-county ranch placements, and to specifically find out what the counseling capability is at YOTP. The dispositional hearing was continued pending the further screening.

A March 9, 2009 letter from the probation department to the court stated that defendant had been referred to three out-of-county ranches: Crystal Creek, Fouts and Bar-O; and the probation department was awaiting their responses. It noted that YOTP placements have been “suspended,” and that YOTP counseling addresses social skills, self-control, decision making, anger management, conflict resolution counseling, gang education, drug and alcohol counseling and education, and victim awareness. It concluded that its placement recommendation remained unchanged.

A report from the Mt. McKinley School, within juvenile hall, was submitted noting that defendant was a “B Average” student and had outstanding attendance. It specifically stated that he is a “capable student,” “gets his work done,” and “needs to be more aware of his conversations with others, but is generally good natured and responds well to reminders.”

At the March 24, 2009 continued dispositional hearing, Momono noted that defendant has done better in a smaller educational setting. He said YOTP had only six wards committed for section 707, subdivision (b) offenses, and acknowledged that defendant’s sustained charges were for two section 707, subdivision (b) offenses. The court stated that YOTP was no longer accepting new referrals. Momono opined that there was a possibility that defendant would reoffend.

Defendant’s mother testified that her divorce from defendant’s father affected defendant “very negatively” and defendant is “far more” sensitive than her other children.

Thereafter, the court was informed that Crystal Creek and Bar-O had rejected defendant, but Fouts had accepted him.

In committing defendant to DJF the court stated: “I have thought about this case a lot. I’ve considered the arguments of counsel and the testimony. I am troubled to some degree by some of the failings of DJF and I’m also troubled by the gravity of this offense. [¶] I don’t think it is accurate . . . to say that [defendant’s] needs will not be met in DJF. I think that it is correct to say that there are certain challenges that meeting those needs face for anyone that goes to DJF at this time. But I am familiar with some of the other material about DJF and I don’t think it’s a fair assessment to say that it’s a complete failure. I do agree there are significant problems.” The court further stated: “I’m going to follow the recommendations of the probation officer. I’m going to commit [defendant] to DJF. I am going to vacate the [section 300] dependency.”

The court noted that section 202 discusses the need to provide for the needs of the minor as well as to include an appropriate sanction for behavior, and that the court must recognize the role that punishment plays in rehabilitation. It found that reasonable efforts

had been made to prevent or eliminate his removal from the home (§ 734), and his mental and physical conditions and qualifications rendered it probable he would benefit from the reformatory educational discipline or other treatment resources provided by DJF. Subsequently, the court determined that defendant's maximum potential confinement term was 10 years with 174 days of credit for time served.

DISCUSSION

Defendant contends the court's decision to commit him to DJF was an abuse of discretion because the evidence established that commitment to a less restrictive placement was in his best interests and could secure community safety.

An appellate court reviews a DJF commitment decision for abuse of discretion. (*In re Angela M.* (2003) 111 Cal.App.4th 1392, 1396 (*Angela M.*)). In conducting our abuse of discretion review, we must indulge all reasonable inferences to support the juvenile court's decision and will not disturb its findings if they are supported by substantial evidence. (*In re Robert H.* (2002) 96 Cal.App.4th 1317, 1329-1330.)

The record must demonstrate both a probable benefit to the minor by a DJF commitment and the inappropriateness or ineffectiveness of less restrictive alternatives. (*Angela M., supra*, 111 Cal.App.4th at p. 1396.) However, these must be considered with the purposes underlying the juvenile court law: "protection and safety of the public" (§ 202, subd. (a)) and "care, treatment and guidance that is consistent with [the minors'] best interest, that holds them accountable for their behavior, and that is appropriate for their circumstances" (§ 202, subd. (b)). (See *In re Jimmy P.* (1996) 50 Cal.App.4th 1679, 1684.) "Although the DJ[F] is normally a placement of last resort, there is no absolute rule that a DJ[F] commitment cannot be ordered unless less restrictive placements have been attempted. [Citations.] A DJ[F] commitment is not an abuse of discretion where the evidence demonstrates a probable benefit to the minor from the commitment and less restrictive alternatives would be ineffective or inappropriate. [Citation.]" (*In re M.S.* (2009) 174 Cal.App.4th 1241, 1250.)

Defendant concedes that pursuant to section 602.3, his offenses committed with personal use of a firearm limit him to placement at a “juvenile hall, ranch, camp, or with the Department of the Youth Authority.” He argues the evidence presented was “overwhelmingly” in favor of a Fouts placement rather than at DJF and the DJF commitment was not supported by substantial evidence.

We conclude the court’s rejection of a Fouts placement and commitment of defendant to DJF was not an abuse of discretion. The 16-year-old defendant used a firearm to rob the 14-year-old victim while the victim was walking home from track practice. Carlson, the defense sentencing expert, conceded the seriousness of defendant’s offense behavior and that defendant has a very significant defiance problem. He was rejected for placement at the Crystal Creek and Bar-O ranch programs. Defendant was previously cited for fighting, causing loud noise or using offensive words in public, as well as for vandalism and underaged purchasing, receiving or possessing and/or selling cigarettes or tobacco. He was previously arrested for resisting or deterring an executive officer. Because his current offenses appear to reflect escalating seriousness and violence, the court could reasonably reject his request for the less restrictive Fouts placement and find that the secure setting of DJF would benefit defendant. In addition, evidence that defendant did well in juvenile hall and the school within juvenile hall supports the court’s determination that a more secure placement would benefit defendant. Evidence was presented that while at DJF defendant would receive services, including assessment and evaluation of treatment needs, academics, risk and needs assessment, psychological testing, substance abuse counseling, anger management, victim awareness and victim impact counseling. The evidence that counseling at Fouts was “more ad hoc” supports the court’s determination that defendant would not necessarily be offered more or better counseling at Fouts than at DJF.

We conclude the court considered all the relevant factors prior to committing defendant to DJF and no abuse of discretion is demonstrated.

DISPOSITION

The order is affirmed.

SIMONS, J.

We concur.

JONES, P.J.

BRUINIERS, J.